DePaul Law Review

Volume 9
Issue 1 *Fall-Winter 1959*

Article 9

Developments in "Right-To-Counsel" Cases

DePaul College of Law

them under the Jones Act would necessarily to a large extent concern itself with the absence of them.

This is true because the Jones Act obviated some defenses existing prior to the enactment. Assumption of risk under the Jones Act is not a defense, though it was before the Act.[96] The same is true of contributory negligence, since under the Act, the doctrine of comparative negligence is followed.[97]

Failure to begin an action within the proscribed three-year period is held to extinguish the cause of action under the Jones Act and hence is an absolute defense by an employer.[98] An employer may also plead a release that is validly executed by a seaman.[99]

CONCLUSION

It should be apparent at this point that the Jones Act is not a clear succinct statement of the law. Attesting to this fact is the mass of litigation concerned to a large extent with ascertaining Congressional intent behind the words of the Act. Certain principles do emerge, however, from this body of interpretation, which comprise the law of the Act and which this writer has enumerated.

The purpose of the Jones Act is to extend the rights of the seamen. This is evidenced by the addition to his rights of an action for negligence, his right to a jury trial for this action, a right of recovery for wrongful death and more. Defenses which would bar this action were abolished. Congress has acted to help the seaman and the courts have complemented this Act by their decisions. It can well be said that seamen are the wards of admiralty.

[96] E.g., The Arizona v. Anelich, 298 U.S. 110 (1936).

[97] Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939); The Arizona v. Anelich, 298 U.S. 110 (1936).

[98] E.g., Engel v. Davenport, 271 U.S. 33 (1926).

[99] Sitchon v. American Export Lines, 113 F.2d 830 (C.A. 2d, 1940); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

DEVELOPMENTS IN "RIGHT-TO-COUNSEL" CASES

At what point in a criminal proceeding does an accused have the right to counsel? A theory more liberal than any heretofore promulgated is found in the concurring opinions of a recent Supreme Court decision. The case with the new answer is *Spano v. People*.[1] In *Spano* the petitioner, under indictment for murder, was subjected to a long period of police grilling. During this interrogation he refused to make a statement, but repeatedly asked to see his counsel. All requests for counsel were denied. Through

[1] 360 U.S. 315 (1959).

use of chicanery, a confession was finally elicited from Spano and admitted into evidence at the trial which resulted in his conviction. On certiorari, the majority of the U.S. Supreme Court reversed on the ground that the confession violated the Fourteenth Amendment to the United States Constitution under "traditional principles."

In reversing under "traditional principles," five of the Justices were apparently saying that the confession was involuntary by reason of the methods used to obtain it. While this case might therefore seem to be a reassertion of settled principles of law, the clues to the important new development in the concept of due process in general, and the right to counsel in particular, are manifest in the two concurring opinions. Emphasis in those opinions was placed upon the absence of counsel at the time the confession was obtained. Four of the Justices joined in pointing out that the denial of counsel alone, to one who has been indicted, during the period of police interrogation, is sufficient to make a confession inadmissible under the Fourteenth Amendment.[2]

The history of attempts to solve the enigma "when is an individual entitled to counsel?" may be traced in a progression of Supreme Court decisions dating back to 1932 and *Powell v. Alabama*,[3] the case heavily relied upon by the concurring judges in *Spano*. In this "landmark"[4] case, the defendants were Negro boys charged with the rape of two white girls. The judge, at arraignment, designated "all the members of the bar"[5] as counsel for the defendants. Defendants were never consulted as to whether they desired to hire counsel or to have the court appoint counsel for them. Their trials (they were tried in several groups at the state's request for severance) resulted in conviction and death sentences for all.

[2] The two concurring opinions seem to have taken exactly the same position, differing only in manner of presentation. In the first opinion, Mr. Justice Douglas was joined by Justices Black and Brennan. Douglas' stand was that a defendant is entitled to counsel immediately after indictment, before trial. Spano v. People, 360 U.S. 315, 324 (1959). The second concurrence, by Mr. Justice Stewart, joined by Justices Douglas and Brennan, in effect stated the same theory as the first. Justice Stewart declared that although arraignment and trial should follow an indictment, in Spano the indictment was followed by a police interrogation. He also pointed out that an accused has a right to counsel in the proceedings (i.e., indictment, arraignment and trial) in a capital case, and that he has an unqualified right to counsel whom he has retained, in any case. Stewart concluded that since the law requires that one on trial in a capital case be allowed counsel in a public court, it should do the same for him during a closed police interrogation. Since Stewart emphasized the fact that the Spano case dealt with the questioning, not of a suspect, but of one who had been indicted, it can be inferred that he, too, was declaring that counsel must be allowed at every point following indictment. Spano v. People, 360 U.S. 315, 326 (1959).

[3] 287 U.S. 45 (1932).

[4] Justice Black designates Powell v. Alabama as "one of [the] landmark decisions" of the Supreme Court, in his dissenting opinion in In re Groban, 352 U.S. 330, 338 and 338 n. 3 (1957).

[5] Powell v. Alabama, 287 U.S. 45, 53 (1932).

In reviewing the convictions, the United States Supreme Court objected to the fact that until the day of the trial the responsibility for the defense of the boys could not be attributed to any one attorney. The Court felt that the judge's general appointment of all members of the bar in order to arraign defendants, and his expectation that they would continue to act for the defendants if no attorney of their own appeared, did not accord the boys sufficient representation. The Court further believed that even if the trial judge had made his appointment not only for arraignment, but for the whole proceeding, none of the lawyers who made up "the bar" would have felt "that individual sense of duty"[6] which comes from the naming of a particular attorney as counsel for the defense.

After demonstrating that the defendants did not have proper representation, the *Powell* Court made a statement that is especially relevant to the problem of when the right to counsel becomes constitutionally mandatory. The Court stated:

> During perhaps the most critical period of the proceedings against these defendants, that is to say, *from the time of their arraignment until the beginning of their trial*, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.[7]

This statement is important for the reason that it gives us some definite pronouncement as to the time when counsel must be allowed, i.e., from arraignment forward. But it is especially significant for the reason that Mr. Justice Douglas, in writing one of the two concurring opinions in the *Spano* case, quotes these very words and concludes from them that to deny counsel to one "*formally charged* with a crime"[8] before trial would be perhaps more serious than to do so during trial. Thus, Justice Douglas would go further and require counsel not after arraignment, but after indictment.

In 1940 the Supreme Court decided another case which had something to say about the time element in the right to counsel question. In *Avery v. Alabama*,[9] at the time defendant was arraigned on the charge of the murder of his wife, two attorneys were appointed to defend him. The case was called to trial three days later, at which time the attorneys moved for a continuance on the ground that they had not had time to formulate their defense because of other trial work. From the record it would appear that no ruling was given on the motion, but in any event, the case pro-

[6] Ibid., at 56.

[7] Ibid., at 57 (emphasis supplied).

[8] Spano v. People, 360 U.S. 315, 325 (1959) (emphasis supplied).

[9] 308 U.S. 444 (1940).

ceeded to trial the same day. The jury found defendant guilty and prescribed the death penalty. In affirming the judgments of the lower courts, the Supreme Court seemed to set up a criterion of determination less liberal than *Powell*'s "from the time of arraignment" standard. Specifically, the *Avery* court said that the Constitution does not set out any length of time between the point when counsel must be appointed and the trial is to be had, and that therefore the mere denial of the continuance did not contravene due process. It was also stated, in effect, however, that the refusal of the continuance *could* have been an unconstitutional denial of legal assistance. The measure used in *Avery* to judge whether the right to counsel had been sufficiently enjoyed was the "facts and circumstances" standard. The Court pointed out, for example, that "under the particular circumstances"[10] of the case before them, there was no deprivation of counsel. One of the facts and circumstances noted was the fact that the trial was had during "Court Week."[11] The Court seemed to feel that since during "Court Week" witnesses and other persons with knowledge of events and occurrences in the county all congregated at the county seat, the attorneys had sufficient opportunity to conduct their investigation.[12] Another consideration of the Court was the zeal of the two attorneys in fighting the case, and carrying it all the way to the Supreme Court.[13]

It should be noted that while *Avery v. Alabama* does establish the "facts and circumstances" test, it does not run in direct opposition to *Powell v. Alabama*, for it cites *Powell* as authority for the statement that the appointment of counsel without affording such counsel the time to prepare could be "nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."[14]

A year after *Avery v. Alabama* (in 1941), another "facts and circumstances" decision was rendered in *Lisenba v. California*.[15] In that case, defendant was picked up on an incest charge and questioned concerning the murder of his wife; he was not allowed to see his counsel till formally arrested on the incest charge. Eleven days after arraignment for the crime

[10] Ibid., at 450.

[11] The Court gave the following explanation concerning "Court Week": "The offense for which petitioner was convicted occurred in a County largely rural. The County seat, where court was held, has a population of less than a thousand. Indictments in the Bibb County Circuit Court, as in most rural Counties throughout the Nation, are most frequently returned and trials had during fixed terms or sessions of court. And these rural 'Court Weeks' traditionally bring grand and petit jurors, witnesses, interested persons and spectators from every part of the County into the County seat for court." Avery v. Alabama, 308 U.S. 444, 450 to 452 (1940).

[12] Avery v. Alabama, 308 U.S. 444 (1940).

[13] Ibid.

[14] Ibid., at 446.

[15] 314 U.S. 219 (1941).

of incest, defendant was taken from the jail where he had been incarcerated and questioned again, without counsel. The Court noted various things in its opinion, among which were the defendant's intelligence, experience in the business world, and calm manner; in view of these and other circumstances, it declared that the sustained questionings in the absence of counsel did not make defendant's confessions involuntary and therefore a violation of due process under the Fourteenth Amendment. It should be observed that the questionings took place *prior* to any indictment on the murder charge. Technically, up to that point, defendant had been proceeded against on the incest charge.

The next case, that of *Hawk v. Olson*,[16] was a 1945 decision. It might seem that this case, on its face, says the same thing as the concurring Justices in *Spano* in regard to the point at which counsel must be allowed. However, *Hawk* does not go as far as the *Spano* concurring opinions. In *Hawk v. Olson* petitioner had had a preliminary hearing on a murder charge; he was subsequently brought before the court and arraigned, when an information charging him with the murder was read to him. He pleaded not guilty and asked for a continuance so that he could, among other things, seek advice of counsel. The request was denied and a Public Defender and his assistant took over petitioner's case without his prior consent, and without having been appointed by the court. Petitioner claimed that he did not consult with these attorneys after their self-appointment. The *Hawk* opinion stated: "We think there was an allegation that no effective assistance of counsel was furnished in the critical time *between the plea of not guilty and the calling of the jury*."[17] This would seem to be the old *Powell* "after arraignment" standard. The theory that it is the *Powell* criterion is substantiated by the very next statement of the Court that whether or not a continuance would have helped petitioner, "the importance of the assistance of counsel in a serious criminal charge *after arraignment* is too large to permit speculation on its effect."[18] The Court also made a statement that might appear to be identical with the holding of the *Spano* concurring opinions: "We hold that denial of opportunity to consult with counsel on any material step *after indictment or similar charge and arraignment* violates the Fourteenth Amendment."[19] Upon examining the sentence, however, it is seen that the holding is not that counsel must be permitted after indictment, but after indictment *and* arraignment, which is just the standard of the *Powell* case.

In 1946, *Canizio v. New York*[20] seemed to swing the pendulum back to the "facts and circumstances" idea of *Avery v. Alabama*—at least as far as

[16] 326 U.S. 271 (1945).

[17] Ibid., at 278 (emphasis supplied).

[18] Ibid., at 278 (emphasis supplied).

[19] Ibid., at 278 (emphasis supplied).

[20] 327 U.S. 82 (1946).

the majority opinion is concerned. *Canizio*, as opposed to *Spano* and all other decisions above reviewed, was a *non*-capital case; this probably should be noted in light of the fact that in 1942 *Betts v. Brady*[21] had held that the defendant in a non-capital criminal case is not entitled to counsel as a matter of right. In *Canizio v. New York* petitioner had been arraigned and had pleaded guilty to a robbery charge without having had benefit of counsel. Petitioner did not deny, however, that a notice of appearance of counsel for him was filed two days before sentencing; this, together with the record of the original proceedings, showed, according to the Court, that Canizio had been "actively represented . . . in long hearings during the day of sentence."[22] They therefore held that under the circumstances the right to counsel had been sufficiently provided for. The dissenting opinion of Mr. Justice Murphy, however, put forth the standard that counsel must be allowed "at each and every step in a criminal proceeding."[23] Though unfortunately Justice Murphy did not define "each and every step of the criminal proceeding," it would seem that his dissent predicted developments along the lines of the *Spano* concurrences.

A capital case decided the same year as *Canizio* was peculiar in its facts. In *Carter v. Illinois*[24] petitioner was a thirty-year-old Negro without formal schooling, and although he had pleaded guilty to the murder charge and waived his right to counsel, it would appear that he had not done so with full realization of the consequences. The Court declared, however, that they were limited to the record before them, and the record contained no facts concerning petitioner's limitations. They decided that they could only consider any such disabilities when put in issue before them. The Court did make mention of a means, however, for determining when counsel is mandatory. This method would appear to be a kind of hybrid of the "facts and circumstances" and "after arraignment" ideas:

> Under *pertinent circumstances*, the opportunity [to meet an accusation] is ample only when an accused has the assistance of counsel for his defense. And the need for such assistance may exist at every stage of the prosecution, *from arraignment to sentencing*.[25]

Reece v. Georgia,[26] decided in 1955, is another case which might be interpreted as going further than the concurring Justices in *Spano*. Upon close scrutiny, though, it would seem to be more a decision in a particular case under particular facts and circumstances. Reece, a Negro, had been arrested, indicted, and convicted of rape. He was not afforded counsel until one day after his indictment. Reece claimed that Negroes had been systematically excluded from the grand jury that indicted him, but under

[21] 316 U.S. 455 (1942).

[22] Canizio v. New York, 327 U.S. 82, 85 (1946).

[23] Ibid., at 89.

[24] 329 U.S. 173 (1946).

[25] Ibid., at 174 (emphasis supplied).

[26] 350 U.S. 85 (1955).

a Georgia rule of practice, objection to the grand jury must be raised *before* indictment. Although the Court could not say, under the circumstances, whether with the aid of an attorney Reece would have been able to make his objection during the time he was in jail, *before* indictment was handed down, they did say (having taken notice both of his lack of education and mental capacity) that it was "utterly unrealistic to say that he had such opportunity when counsel was not provided for him until *the day after he was indicted.*"[27] The Court then relied upon *Powell* to support its decision, quoting that part of the opinion which says that mere appointment of counsel does not satisfy due process if done "at such time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of a capital case. . . ."[28] Although it would seem that *Reece* holds that a defendant has a right to counsel *before* indictment, which would be a more liberal rule than that in *Spano*, in actuality it makes no objective declaration that *all* defendants are entitled to counsel before indictment, but merely says that under these particular facts and circumstances this particular defendant was unconditionally denied an attorney-at-law. Perhaps the case is significant for another reason. It did not adopt the touchstone in *Powell* that a defendant is entitled to counsel from arraignment; instead it took a statement from the *Powell* case and indicated that there were possibilities for the generation of an even more liberal interpretation of when advice of counsel becomes an undeniable right.

Was *Reece v. Georgia* auguring some expansion of *Powell v. Alabama?* Some indication to this effect appeared in a dissent in the 1957 case of *In re Groban.*[29] The *Groban* majority decided that a witness being interrogated in an investigation by the state fire marshal had no right to counsel. One of the concurring Justices in *Spano v. New York* took special pains to distinguish the *Groban* case on the basis that it involved witnesses in an administrative hearing rather than one charged with a capital case as in *Spano*, therefore making it plain that the *Groban* opinion would not control. Although *Groban* does not control, the dissenting opinion of Mr. Justice Black[30] is worthy of note for the declaration that it makes concerning when counsel becomes a matter of right:

> I . . . firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testi-

[27] Ibid., at 89, 90 (emphasis supplied).

[28] Ibid., at 90.

[29] 352 U.S. 330 (1957).

[30] Spano v. People, 360 U.S. 315 (1959). It might be well to remember at this point that Justice Black joined in Justice Douglas' concurring opinion on the matter of right to counsel.

[31] In re Groban, 352 U.S. 330, 344 (1957).

mony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense.[31]

Justice Black states further that "this Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him,"[32] seemingly indicating that it is a foregone conclusion that every person is entitled to legal advice during grilling in a state criminal case.

Two cases which were reviewed in 1958 raised the problematic point of when counsel must be permitted. Both involved the interrogation of suspects in murder cases, and the majority of the Court held in both cases that the suspects were not entitled to counsel during the period of questioning.[33] Both concurring opinions in *Spano* pointed out, however, that Spano was not a mere suspect, but had been indicted. Although the cases as thus distinguished may not be precisely in point, what they said deserves mention.

One of the two 1958 decisions is *Cicenia v. Lagay*,[34] which took the position uttered in the *Avery* case that there was no absolute right to counsel during questioning, but rather when the right would be necessary was a matter of facts and circumstances. The other, and more important of the two cases, *Crooker v. California*,[35] would also seem to be a "facts and circumstances" decision. The majority of the Court, however, did seem to indicate the time at which counsel might be necessary, agreeing that to deprive counsel "for *any part of the pretrial proceedings*"[36] might mean denying due process. But they further stated that the deprivation would have to be such as to make impossible a fair trial, and "the latter determination necessarily depends upon all the *circumstances* of the case."[37]

The *Crooker* case deserves mention here for still another statement of the majority and the ensuing criticism of the dissenting Justice. The majority stated that petitioner Crooker's contention that any denial of a request for counsel would be a denial of due process, no matter the circumstances involved, at the least "would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney."[38] Referring to *Betts v. Brady*, it was concluded: "Due process . . . demands no such rule."[39] Following this is a footnote which anticipates one of the arguments of Mr. Justice Douglas' dissenting

[32] Ibid., at 344.

[33] Crooker v. California, 357 (U.S. 433 (1958); Cicenia v. Lagay, 357 U.S. 504 (1958).

[34] 357 U.S. 504 (1958).

[35] 357 U.S. 433 (1958).

[36] Ibid., at 439 (emphasis supplied).

[37] Ibid., at 440 (emphasis supplied).

[38] Ibid., at 441.

[39] Ibid., at 441.

opinion in *Crooker*.[40] The footnote says, in substance, that the opinion of the majority does not extend *Betts v. Brady* (which held that a refusal of the court to appoint counsel in a non-capital criminal case did not deny due process) to a capital case, nor does it overrule *Powell v. Alabama* and similar cases. The note continues: "[T]hose decisions involve another problem, *trial* and conviction of the accused without counsel after state refusal to appoint an attorney for him."[41] Yet in the light of previous discussion, *Powell* does not just consider whether representation by counsel *at trial* is necessary, but rather it decides that such representation is a matter of right well *before trial*, specifically setting up "after arraignment" as the gauge. Therefore, Douglas' criticism that "the rule of *Betts v. Brady*, which never applied to a capital case . . . is now made to do so,"[42] and his further observation that proceeding on the assumption "that *Betts v. Brady* was properly decided, there is no basis in reason for extending it to the denial of a request for counsel when the accused is arrested on a capital charge," [43] would seem well taken.

Mr. Justice Douglas, who wrote one of the concurring opinions in *Spano*, gave stronger expression to his beliefs concerning right to counsel in his *Crooker* dissent, wherein he stated: "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at *any time after the moment of arrest*."[44] After this declaration, Justice Douglas seems to be restraining himself in *Spano;* he, in effect, says at the inception of the *Spano* opinion: "While everyone will not agree with me that a *suspect* has the right to counsel, surely no one will dispute that it is imperative for one who has been *indicted*."

CONCLUSION

In light of all that has been said up to this point, do the concurring opinions in *Spano v. People* suggest a trend toward an increased right to counsel in a criminal case? *Powell v. Alabama* held that a defendant is entitled to counsel "after arraignment." Mr. Justice Douglas declared in a dissenting opinion in *Crooker v. California* that the right should extend to "after the moment of arrest." Justice Douglas' dissenting view, as modified to "after indictment," attained the stature of a concurring opinion approved by two brother Justices in *Spano v. People*. The indication is that we are advancing toward majority holdings that will require counsel at each and every step in a criminal case.

[40] Ibid., at 441, n. 6.

[41] Ibid., at 441, n. 6 (emphasis supplied).

[42] Ibid., at 443.

[43] Ibid., at 443.

[44] Ibid., at 448 (emphasis supplied).